

The Non-combatant Casualty Cut-off Value: Assessment of a Novel Targeting Technique in Operation Inherent Resolve

Scott Graham

Osgoode Hall Law School, York University, Toronto, Canada

Abstract

A tension exists between treaty protections afforded to civilians in non-international armed conflicts from becoming objects of attacks and the International Criminal Court's jurisdiction to punish commanders who recklessly cause such casualties. Yet, media and human rights organizations' criticism that the non-combatant casualty cut-off value (NCV) constitutes a war crime cannot survive rational examination of the *mens rea* requirement in the Rome Statute. Coalition commanders and targeteers must ensure the NCV is neither presumptively nor conclusively applied in target engagement, whilst taking constant care to focus proportionality assessments to spare civilians.

Keywords

non-combatant casualty cut-off value (NCV) – targeting – proportionality – distinction – non-international armed conflict – intentional attacks – war crimes – ISIS

...

By [codifying the rules of war derived from State practice], [it is] a service to military men themselves... A positive set of rules ... serves the interests

* The Royal Regiment of Canadian Artillery, deployed as a lethal targeting officer in support of Operation Inherent Resolve in 2015/2016 at the Combined Joint Task Force Headquarters to defeat ISIS in Iraq and Syria. The views expressed herein are my own and do not reflect the views of the Government of Canada or of any coalition member nation. The author wishes to thank Toronto criminal defence counsel Michelle Fernandes for helpful edits.

One Mission, Many Nations.

of belligerents and is far from hindering them, since by preventing the unchaining of passion and savage instincts – which battle always awakens, as much as it awakens courage and manly virtues – it strengthens the discipline which is the strength of armies; it also ennobles their patriotic mission in the eyes of the soldiers by keeping them within the limits of respect due to the rights of humanity.

PREFACE TO THE OXFORD MANUAL OF THE LAWS OF WAR ON LAND, 1880



1 Introduction

Human rights organizations' and media criticism of the non-combatant casualty cut-off value (NCV)¹ as an unlawful means to justify lethal targeting² of civilians requires careful consideration. While international humanitarian law (IHL) ought not bend under fire, such criticism must be assessed in light of the operational environment where levelled. That the Islamic State in Iraq and Syria (ISIS) terrorist network employs lawfare and other barbaric tactics to undermine the coalition air campaign cannot unravel the fabric of the rule of law to be defended. To be certain, intentional targeting of civilians is never permissible under the Law of Armed Conflict (LOAC). As such, modern commanders remain challenged to defeat an ill-defined enemy through precision

¹ The non-combatant and civilian casualty cut-off value, also known as the non-combatant casualty cut-off value (NCV), is a policy driven rule of engagement that imposes a civilian casualty ceiling incident to the engagement of a valid military target. If sought to be exceeded, the commander must refer-up to national-level government for review as a sensitive target. The NCV may be tailored for a specific area of operations, mission, weapon system, in relation to a specific enemy or for a specified duration. A commander may also be delegated a specific NCV.

² A target is the object considered for particular action, for example, an area, complex, equipment, force, installation, individual, group or system planned for capture, destruction, exploitation, influence or neutralization by military forces. Targeting is the process of selecting and prioritizing targets and matching the appropriate response in consideration of operational requirements and capabilities. See *generally* Canadian Forces Joint Targeting Publication 3-09 Targeting 1st Edition (2014). See *also* United States Joint Chiefs of Staff, Joint Publication 3-60: Joint Doctrine for Targeting (31 Jan 2013).

strikes whilst taking constant care to minimize civilian casualty inevitable in the ravages of war.³

This article will scrutinize whether claims NCV counting constitutes a war crime may be rationally supported having regard to LOAC and IHL principles. In particular, whether misapplication of the NCV methodology might result in criminal responsibility pursuant to the Rome Statute of the International Criminal Court (ICC).⁴ In studying this question, the cornerstone targeting principles of distinction and proportionality as informed through the Protocols Additional⁵ to the fourth Geneva Convention of 1949⁶ will be considered.

First, the unique operational, political and religious conflict-rich environment of the Iraq/Syria theatre of operations will be illuminated. Indeed, the operational environment and security threats must be considered together with humanitarian factors to inform such legal analysis in armed conflict. The next section will review the intersection of targeting law and criminal responsibility resulting from the Rome Statute prohibitions to intentionally direct attacks against civilian populations and objects, including distinction, precautions in the attack, proportionality and military necessity. The last part will then review media and human rights groups' concerns that reliance on the NCV to manage collateral damage not only represents callous disregard for humanity, but that such practice might constitute a war crime. In particular, this paper will examine whether the NCV methodology can be seen to presumptively determine permissible civilian 'kill rates' without due consideration of target specific precautions and proportionality assessments as required by IHL. In analysing this concern, the NCV methodology employed in Operation Inherent Resolve (OIR) will be examined with a view to assess compliance with LOAC requirements. This paper will conclude the OIR NCV methodology is a strategically and legally sound measure to control target engagement and mitigate civilian

3 For a discussion on this 'fragile equipoise', see Michael N. Schmitt, 'Military Necessity and Humanity in International Humanitarian Law: Preserving the Delicate Balance', 50 *Virginia J. International Law* (2010) 795.

4 Rome Statute of the International Criminal Court, 2187 U.N.T.S. 90 (17 July 1998) [Rome Statute].

5 Protocol Additional to the Geneva Conventions of August 12, 1949, and Relating to the Protection of Victims of International Armed Conflicts Art. 51(3), June 8, 1977, 1125 U.N.T.S. 3 [Additional Protocol I (AP I)]; Protocol Additional to the Geneva Conventions of August 12, 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts Art. 13(3), June 8, 1977, 1125 U.N.T.S. 609 [Additional Protocol II (AP II)].

6 United Nations, Convention (IV) Relative to the Protection of Civilian Persons in Time of War Art. 2, 12 August 1949, 75 U.N.T.S. 287 [Geneva Convention IV].

casualty. Further, such novel targeting practice cannot be considered a war crime.

Prior to examining the theatre of operations and respective targeting constraints, a brief review of the contemporary rise of the Islamic State (IS) is warranted. Briefly stated, the IS is a militant organization whose goal is to establish a Sunni caliphate in the Middle East that was forged a decade earlier.

2 Area of Operations: Iraq and Syria

2.1 *Origin of ISIS in Iraq*

In the early 2000s, Jordanian Islamist, Musab al-Zarqawi set up militant training camps in Herat, Afghanistan to train *Jamat al-Tawhid wal-Jihad (JTF)* fighters after receiving logistical and financial support from Al Qaeda.⁷ During the 2003 invasion of Iraq, Zarqawi's insurgency sought to expel United States and coalition forces, Iraqi collaborators and disrupt governmental transition to Shiite control. Moreover, Zarqawi sought to establish an Islamic state under Sharia law: "We will fight in the cause of God until His shariah prevails. The first step is to expel the enemy and establish the state of Islam. We would then go forth to reconquer the Muslim lands and restore them to the Muslim nation..."⁸

Although Osama Bin Laden and Zarqawi were at odds strategically, in that Zarqawi favoured attacking 'near enemies', including Israel and Jordan, and Bin Laden 'far enemies' including the United States, Zarqawi ultimately pledged allegiance to bin Laden and established Al Qaeda in Iraq (AQI) in 2004.⁹

This affiliation, however, continued to be strained as Bin Laden did not share Zarqawi's distaste for Shiites, nor violent and extreme tactics to kill Shiites and destroy religious sites to incite sectarian violence. Similarly, although AQI initially gained traction among the Sunni populace for fear of a Shiite government takeover, many Islamic groups denounced this radical brand of Islam. The assassination of popular Sunni leaders to incite sectarian violence and AQI's increasing recruitment of foreign fighters were widely criticized.¹⁰

7 Ahmed S. Hashim, 'The Islamic State: From al-Qaeda Affiliate to Caliphate', XXI (4) *Middle East Policy Council* (December 2014) 1.

8 *Ibid.*

9 Joseph Felter and Brian Fishman, 'Al Qaeda's foreign fighters in Iraq: A first look at the Sinjar records', *Combating Terrorism Center at West Point*, <<http://ctc.usma.edu/harmony/pdf/CTCForeignFighter.19.Dec07.pdf>>, 19 December 2007.

10 Institute for the Study of War, *Mapping Militant Organizations: The Islamic State*, <www.understandingwar.org>, Washington, DC, July 2016.

To unify resistance against coalition forces and establish a leadership council upon coalition withdrawal, Iraqi centric re-branding was required. Thus, in 2006, Zarqawi's successor, Egyptian bomb maker Abu Ayub al-Masri, appointed Iraqi Abu Umar al-Baghdadi as figurehead of a newer Iraqi centric jihadist organization – the Islamic State of Iraq (ISI). Despite claims that Iraqis maintained control of AQI, discontent with increasing enlistment of foreign fighters, taxation of Sunni businesses and disrespect of local cultural norms led to a Sunni uprising against the insurgency in Anbar province.¹¹

Indeed, the 'Anbar awakening' precipitated coalition and Iraqi Security Forces (ISF) successes to disrupt AQI's ability to provide security, govern and enforce radical Islamic law throughout its dwindling territory. From 2009–2011 AQI fractured from Al Qaeda, with the majority of its leadership killed or captured by United States funded tribal factions¹² acting in concert with coalition forces. Masri and al-Baghdadi were killed in a joint US-ISF raid in April 2010 after which Abu Bakr al-Baghdadi assumed control of a nearly defeated AQI. In hindsight, concerns that coalition forces' withdrawal in December 2011 would leave a power vacuum were well founded.

Throughout 2012 and 2013, with enhanced freedom of manoeuvre, AQI brutally targeted both the Maliki Shiite government and the ISF. The Maliki government was largely targeted to free Sunni prisoners captured in prior years, while the ISF was attacked for clearing Sunni protest camps denouncing oppressive Shiite rule in Anbar province.¹³ During this period of the 'Breaking the Walls' campaign, ISIS liberated several thousand prisoners, including the notorious Abu Ghraib prison.¹⁴ Similarly, ISF efforts to clear Sunni protests in Ramadi were met with local uprising which repelled ISF from the region, thereby facilitating AQI's 'Soldier's Harvest' campaign to seek retribution against Maliki's ISF through blowing up soldiers' homes, conducting

11 The 'Anbar Awakening' (Sahwa) was a movement of Sunni tribesman in Anbar province to join coalition forces to largely defeat AQI in 2007, while also securing Sunni positions in the Shiite dominated ISF. A year later, 2,400 AQI had been killed and 8800 captured. By 2009, the US Government funded 100,000 local Sunni anti-insurgents to fight AQI. See M.J. Kirdar, 'Al Qaeda in Iraq', in Centre for Strategic and International Studies, *Al Qaeda and Associated Movements (AQAM) Futures Project, Case Study No. 1* (June 2011), citing Peter Bergen, *The Longest War* (Free Press, New York, 2011) p. 161.

12 *Ibid.*

13 See Kirdar, *supra* note 11; and Institute for the Study of War, *supra* note 10.

14 David Ignatius, 'How ISIS Spread in the Middle East: And How to Stop It', *The Atlantic*, <www.theatlantic.com>, p. 10, 29 October 2015. See also J.D. Lewis, *Middle East Security Report 14: Al-Qaeda in Iraq Resurgent: The Breaking the Walls Campaign, Part 1*, Institute for the Study of War, <www.understandingwar.org>, September 2013.

drive by shootings at check-points and assassinating members of the officer cadre.¹⁵

2.2 *Syria*

Meanwhile, AQI used the cover of the Syrian Civil War to recruit, train and conduct operations against Islamic groups and the Syrian and Iraqi governments. Thus, in April 2013, Baghdadi re-named the expanded group – the Islamic State in Iraq and Syria (ISIS). Disturbed by Baghdadi's unilateral pronouncement, the al-Nusrah Front was subsumed by AQI;¹⁶ Al Qaeda leader Ayman al-Zawahiri denounced the expansion and claimed AQI should limit jihad to Iraq. After Baghdadi publicly rejected Zawahiri's edict, Al Qaeda formally renounced any partnership with ISIS in February 2014.¹⁷

2.3 *Establishing a Caliphate*

Despite severing ties with Al Qaeda, ISIS continued to attack rebel groups, tribal factions, the Kurdish peshmerga and government forces. Firmly entrenched in Ar Raqqa, receiving foreign fighters and fuelling the conflict between neighbouring governments and tribal forces through its media machine Dabiq,¹⁸ ISIS prepared to mount cross-border attacks. Its goal was to seize large swaths of Muslim territory to establish a caliphate. The complicated relationship between ISIS and various Middle East players is well documented by the *Economist* magazine.¹⁹

In January 2014, ISIS seized Fallujah, then large parts of the provincial capital Ramadi before storming Mosul in June 2014. Through partnership with commanders and intelligence operatives of Saddam's Baath regime, ISIS activated a shadow administration taking control of municipal infrastructure, electrical and water works. ISF and local leaders were persuaded to abandon post. Those who did not were targeted through suicide bombings, assassination campaigns and group murder to intimidate remaining police and security forces.²⁰ Already disgruntled and having no allegiance to Maliki's Shia

15 Paul Danahar, 'Chapter 6', *The New Middle East: The World after the Arab Spring* (Bloomsbury Press, London, 2013).

16 Al-Nusrah Front leader Abu Muhammad al Julani subsequently publicly rejected Baghdadi's decree and confirmed allegiance to al-Zawahiri and Al Qaeda, *infra* note 17.

17 Thomas Joscelyn, 'Al Qaeda's General Command Disowns the Islamic State of Iraq and the Sham', *The Long War Journal*, <www.longwarjournal.org>, February 2014.

18 *Dabiq* is a deep web magazine published by ISIS for Unitarianism, truth-seeking and jihad holy war.

19 *The Economist*, 'The Middle Eastern Mesh', <www.economist.com>, 3 April 2015.

20 Hashim, *supra* note 7.

government, thousands of Sunni ISF surrendered abandoning armoured vehicles, mortars and artillery pieces into the ISIS fold. In addition to combat losses in the preceding months in Anbar province, efforts to repel the Mosul attack and large-scale desertion – ISF lost four army divisions.²¹ This swift and massive loss rendered ISF combat ineffective, thereby stripping its ability to conduct counter-offensive operations against ISIS forces. This success led the governing council, the Shura,²² to declare the Islamic State (IS) had been achieved and its occupied territory the new caliphate. Abu Bakr al-Baghdadi was named the new Caliph with messaging that Muslims everywhere should pledge their allegiance to him.²³

2.4 *Economy*

In order to fund its rapid expansion, pay fighters and administer services in territory under control along the Euphrates River Valley, ISIS primarily relied upon oil revenue from black market sale to Syria, Turkey and Jordan. Thereafter, ISIS operated refineries in occupied lands with average production rates estimated at 10,000 and 30,000 bpd. Oil revenue is difficult to measure since frustrated by inaccurate information on operating capacity, coupled with volatile crude prices during 2014–2016. Nevertheless, some analysts suggested ISIS generated USD 1–2 million a day prior to the destruction of several facilities by coalition strikes in 2015/2016.²⁴ Moreover, if ISIS were to produce and sell natural gas from facilities under its control, it could potentially generate another USD 489 million per year.²⁵

In addition to oil black market sales, ISIS generated USD 360 million cash revenue annually from taxation and extortion of businesses under its territorial control.²⁶ So, too, did ISIS raid banks including an estimated

21 *Ibid.*

22 As discussed in Section two, ISIS organization is a factor to determine whether an armed conflict exists, such that International Humanitarian Law principles apply. In addition to the Shura Council, al-Baghdadi also pronounced Military and Security and Intelligence Councils such that the Caliph governs both political and religious matters.

23 *Ibid.*, see also David T., 'Can Iraq be Saved'? Survival: 56(5) *Global Politics and Strategy* (2014) 11–12.

24 'How ISIS Works', *The New York Times*, 16 September 2014. See also Sanger D. and Davis J.H., 'Struggling to Starve ISIS of Oil Revenue, U.S. Seeks Assistance from Turkey', *The New York Times*, 13 September 2014.

25 *Ibid.*

26 Jean-Charles Brisard and Damien Martinez, 'Islamic State: The Economy Based Terrorist Funding', White Paper – Thomson Reuters Accelius, October 2014.

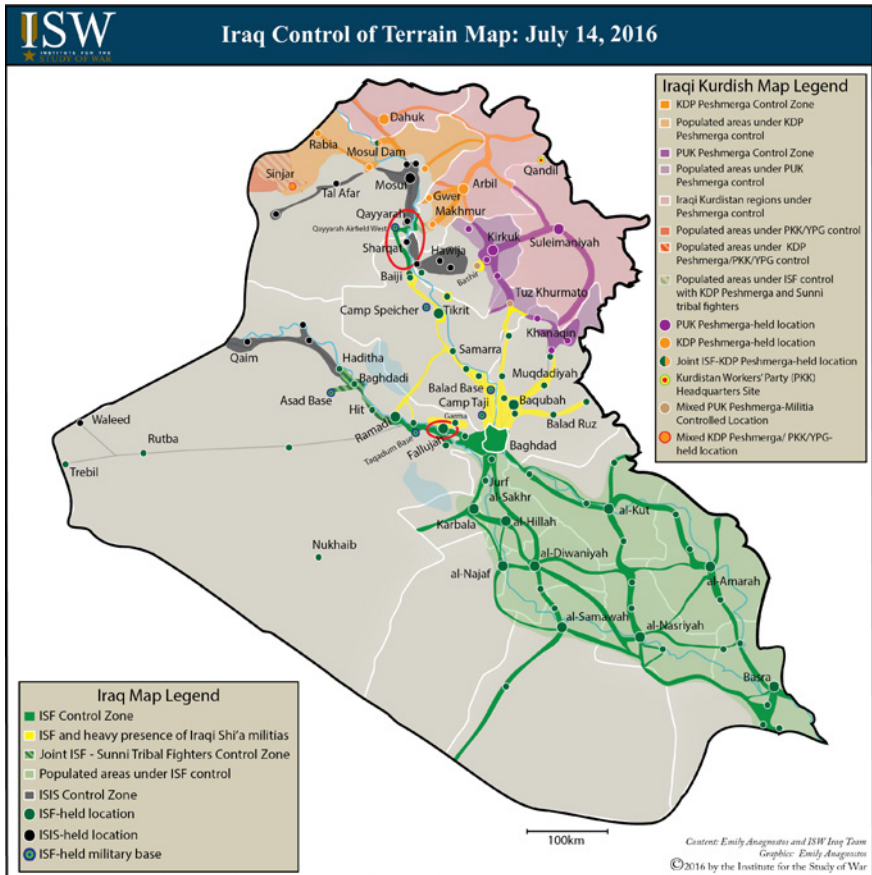


FIGURE 1 *Iraq map*

REPRINTED WITH PERMISSION FROM THE INSTITUTE FOR THE STUDY OF WAR

USD 400 million from the Mosul Central Bank.²⁷ In effort to support fruition of the caliphate, sympathizers from Kuwait, Jordan, Saudi Arabia and Syria, together with self-radicalized foreigners donate approximately USD 40 million annually.²⁸ Finally, ISIS further diversified its illicit income stream to include

27 Terrence McCoy, 'ISIS just stole \$425 million, Iraqi governor says, and becomes world's richest terrorist group', *The Washington Post*, 12 June 2014. See also R. Nordland and A.J. Rubin, 'Iraq Insurgents Reaping Wealth as They Advance', *The New York Times*, 20 June 2014.

28 'How the Islamic State Makes its Money', *The Washington Post*, <www.washingtonpost.com>, 28 February 2016.

revenue from criminal activities. As a comparator, AQI similarly netted approximately USD 70–200 million in 2006 from criminal enterprise.²⁹

2.5 *Jihadi and Lawfare Tactics*

In addition to criminal operations including drug, sex and slavery trafficking, kidnapping for ransom, robbery and smuggling, ISIS conducted insurgent (jihad), psychological and traditional military operations to wage holy war with infidels. Notoriously, in addition to use of chemical weapons, improvised explosive devices (IED), vehicle borne improvised explosive devices (VBIED), ISIS is globally criticized for brutal violence through public executions and decapitation – often broadcast online through a sophisticated network of servers to instil fear and panic among its adversaries.

Suicide bombing, often conducted by foreign fighters seeking paradise in a perilous land, is a common tactic to distract government authorities. Through simultaneously targeting civilians, organized opposition groups and military forces, ISIS generates confusion and paralyzes government response.

Australia, Belgium, Canada, France, Iraq, Turkey and the United States have all witnessed the terror of ISIS attacks.³⁰ Moreover, ISIS recently has been condemned by the United Nations Human Rights Council for committing genocide, crimes against humanity and war crimes against the Yazidis of Sinjar, Iraq whom ISIS views as infidels. On application to the UN Security Council to refer the situation in Syria to the International Criminal Court, or establish a tribunal with relevant geographic/temporal jurisdiction, the Commission of Inquiry on the Syrian Arab Republic stated:

ISIS has sought to destroy the Yazidis through killings; sexual slavery, enslavement, torture and inhuman and degrading treatment and forcible transfer causing serious bodily and mental harm; the infliction of conditions of life that bring about a slow death; the imposition of measures to prevent Yazidi children from being born, including forced conversion of adults, the separation of Yazidi men and women, and mental trauma; and the transfer of Yazidi children from their own families and placing them with ISIS fighters, thereby cutting them off from beliefs and practices of their own religious community, and erasing their identity as Yazidis. The

²⁹ Brisard and Martinez, *supra* note 26.

³⁰ 'Where ISIS has directed and inspired attacks around the world', *The New York Times*, <www.nytimes.com>, 22 March 2016.

public statements and conduct of ISIS and its fighters clearly demonstrate that ISIS intended to destroy the Yazidis of Sinjar, composing the majority of the world's Yazidi population, in whole or in part.³¹

As a result of such terror tactics, the Security Council declared that ISIS 'constitutes a global and unprecedented threat to international peace and security'.³² The Security Council, despite its diligence, is incapable of moving with requisite speed to respond to terror threats.³³ Therefore, reliant upon the infamous 9/11 congressional Authorization for Use of Military Force (AUMF) to defeat Al-Qaeda and its affiliates,³⁴ the United States President acted with great dispatch to obtain Congressional funding, Iraqi concurrence and a multi-nation coalition partnership to stand-up Operation Inherent Resolve (OIR). In addition to an 'advise and assist' mission to train ISF and Vetted Syrian Opposition Forces (VSO), OIR principally conducted lethal airstrikes in support of ground manoeuvre to defeat ISIS in Iraq and Syria.

2.6 *Lawfare*

In addition to offensive terror tactics, ISIS employs abusive lawfare³⁵ tactics to shield itself from superior coalition air and firepower. Moreover, ISIS employs lawfare tactics knowing coalition forces cannot reprise³⁶ or otherwise

31 United Nations Human Rights Council, 'Report of the Independent International Commission of Inquiry on the Syrian Arab Republic: "They came to destroy": ISIS Crimes against the Yazidis, Doc.NA/HRC/32/CRP, 16 June 2016.

32 United Nations Security Council Resolution 2249 (2015).

33 Peter Wallensteen and Patrik Johansson, 'The UN Security Council: Decisions and Actions', in Sebastian von Einsiedel, David M. Malone and Bruno Stagno Ugarte (eds.), *The UN Security Council in the 21st Century* (Lynne Rienner Publishers, Boulder, CO, 2015) pp. 27–55.

34 The Authorization for Use of Military Force (AUMF), Pub. L. 107–40, codified at 115 Stat. 224 and passed as S.J. Res. 23 by the United States Congress on 14 September 2001, authorizes the use of United States Armed Forces against those responsible for the World Trade Centre attacks on September 11, 2001 and any "associated forces".

35 Charles J. Jr. Dunlap, 'Lawfare Today...and Tomorrow', 87 *Int'l L. Stud. Ser. vs Naval War Col.* (2011) 315 wherein the author defines 'lawfare' as the strategy using or abusing the law in place of traditional military means to achieve warfighting objectives.

36 William A. Schabas, *An Introduction to the International Criminal Court*, 4th ed. (Cambridge University Press, Cambridge, 2014) at p. 135 wherein the author notes the ancient rules of chivalry underpinning Hague law prevent reprisals against states who violate international humanitarian law.

derogate from LOAC obligations without losing essential domestic support for the combat mission. Lacking a prescribed chain of command and clearly defined uniforms, ISIS is able to attack then blend into the local community. Such 'shoot and scoot' tactics impair the coalition's ability to positively identify hostile combatants and direct participants in hostilities (DPH). Moreover, ISIS knows theatre standing orders dictate that, unless positive identification is made, targets shall be presumed to be civilian and entitled to protection afforded in non-international armed conflict (NIAC) pursuant to LOAC.

Overt lawfare tactics employed include training and fighting from LOAC protected facilities including critical and life sustaining agricultural facilities (i.e. grain silos), hydro-electric dams, hospitals, mosques, schools – all of which result in irreparable collateral damage and civilian casualties when targeted. After impelling collateral damage to defeat ISIS targets, ISIS responds with professional grade propaganda to undermine coalition efforts to promote peace and stability.³⁷ Through media manipulation, ISIS broadcasts false messaging the coalition intentionally kills innocent women and children, destroys holy mosques to suppress Islam and plunders territorial resources. Through fabricating war crimes, ISIS collaborators seek to undermine the coalition's strategic centre of gravity – public support and financing for the mission. Arguably, diminishing public support resulted in the Canadian government withdrawing CF-18 fighter jets from OIR in March 2016.³⁸ Finally, ISIS uses involuntary human shields to protect its leadership and critical infrastructure while conducting mobile operations. As many a soldier oft commented, ISIS leaders travel with a woman in the front and a child in the rear.

Having reviewed the multitude of political, economic, insurgent and religious factors influencing targeting strategy to defeat ISIS, potential criminal responsibility arising from target engagement resulting in civilian casualties follows in the next section.

37 For insight into ISIS' politico-military campaign, *see generally*, Haroro J. Ingram, 'Learning from ISIS's virtual propaganda war for Western Muslims: A comparison of Inspire and Dabiq', The International Centre for Counter-terrorism (The Hague), (2017) online at <https://icct.nl/wp-content/uploads/2017/07/INGRAM-nato-chapter-21JUL17.pdf>.

38 'Canada will pull jets from combat role before end of March: Trudeau', *The Globe and Mail*, <www.globeandmail.ca>, 15 November 2015.

3 Criminal Responsibility Arising from Misapplication of the NCV Methodology

That targeting law has been described as a ‘complex’,³⁹ ‘constant[ly] challenging’,⁴⁰ requiring ‘extreme intricacy’⁴¹ is no reason to abandon its skilful application in modern ‘unprecedented’⁴² warfare. The legitimacy of lethal targeting decisions, particularly where civilian casualties and collateral damage necessarily result, must ultimately be judged against ‘elementary considerations of humanity’.⁴³

As a preliminary measure, whether ISIS is engaged in armed conflict and whether such conflict is international or non-international in nature must be determined. This is important from a targeting perspective since the degree of protection afforded to civilians and cultural property differs through application of treaty, IHL and international human rights law (IHRL). This, in turn, affects culpability for war crimes.⁴⁴

3.1 Armed Conflict

As eminent targeting professor Michael Schmitt notes, whether an armed conflict exists has profound implications for the application of targeting law.⁴⁵ In an armed conflict, IHL principles apply which permit for a wider scope of target engagement as against members of organized armed groups (OAG) and civilians directly participating in hostilities (DPH). Conversely, should a

39 Geoffrey S. Corn. and Gary P. Corn, ‘The Law of Operational Targeting: Viewing the LOAC through an Operational Lens’, 47(2) *Texas International Law Journal* (2012) 349.

40 Geoffrey Corn and J.A. Schoettler, ‘Targeting and Civilian Risk Mitigation: The Essential Role of Precautionary Measures’, 223(4) *Military Law Review* (2015) 837.

41 Michael N. Schmitt, ‘Targeting and International Humanitarian Law in Afghanistan’, 85 *International Law Studies* (2013), 307.

42 UNSC Resolution 2249, (2015).

43 Military and Paramilitary Activities in and against Nicaragua (*Nicar. v. U.S.*), 1986 I.C.J. 14, 218 (27 June), referring to Corfu Channel (*U.K. v. Alb.*), 1949 I.C.J. 4, 22 (19 Dec.) cited in Schmitt, *supra* note 41, p. 14.

44 Lindsay Moir, ‘It’s a bird! It’s a plane! It’s a non-international armed conflict!’: Cross-border hostilities between states and non-state actors’, in Caroline Harvey, James Summers and Nigel D. White (eds.), *Contemporary Challenges to the Laws of War* (Cambridge University Press, Cambridge, 2014), Ch. 4, p. 71.

45 Michael N. Schmitt, ‘Charting the Legal Geography of Non-International Armed Conflict’, 90 *International Law Studies* (2014) 2.

conflict found to be purely domestic, attracting the application of IHRL, targeting will be restricted to situations 'strictly unavoidable to protect life'.⁴⁶

There can be little doubt ISIS is involved in armed conflict given its membership peaked at 35,000–40,000 fighters,⁴⁷ who are well recruited, trained, armed, organized and funded to conduct sustained military operations against both state and opposition armed forces. Certainly, these factors meet the 'organizational' threshold to confirm presence of an armed conflict as articulated by the International Criminal Tribunal for the Former Yugoslavia (ICTY) in *Prosecutor v. Tadić*.⁴⁸ Moreover, the required 'intensity threshold' is clearly established through the violent and criminal atrocities described in the first section.⁴⁹

3.1.1 International Armed Conflict

Since ISIS is not an internationally recognized sovereign state (despite its self-proclamation) and therefore not party to the 1949 Geneva Conventions, Common Article 2 (CA2) governing International Armed Conflict (IAC) is not applicable.⁵⁰ Nor is Additional Protocol I (AP I) which supplements protection of civilians from hostilities in CA2.⁵¹ Nor is it likely that coalition members who train and equip opposition forces exercise 'overall control' of operations so as to 'internationalise' the conflict.⁵² In the context of non-state parties, Lindsay Moir concluded "...intervention of a third state at the request of a government engaged in internal hostilities against a non-state party does not serve to internationalise the conflict".⁵³ Similarly, coalition efforts to pursue the OAG

46 Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 Aug.–7 Sept. 1990, *Basic Principles on the Use of Force and Firearms by Law Enforcement Officials*, U.N. Doc. A/CONF.144/28/Rev.1, at 112, 114 (1990) cited in Schmitt, *supra* note 41.

47 Samia Nakhoul, 'Saddam's former army is secret of Baghdadi's success', *Reuters World News*, <www.reuters.com>, 16 June 2015; *see also*, Paul Shinkman, 'ISIS by the numbers', *US News*, <www.usnews.com>, 27 December 2017.

48 *Prosecutor v. Tadić*, Case No. IT-94-I-AR72, ICTY, Decision on the Defence Motion for Interlocutory Appeal, 2 October 1995, para. 70: 'an armed conflict exists ... resort to armed force between States or protracted armed violence between ... organized armed groups or between such groups within a State'.

49 *Ibid.*

50 Common Article 2 applies 'to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them', *supra* note 6.

51 Protocols Additional to the Geneva Conventions of 12 August 1949, *supra* note 5.

52 *Prosecutor v. Tadić*, Case No. IT-94-I-A, ICTY, Appeals Chamber, Judgment, 15 July 1999, paras. 137 and 145 [*Tadić* Appeals Judgment].

53 Moir, *supra* note 44, p. 89.

ISIS across Iraqi borders cannot be construed to incite an international armed conflict.

3.1.2 Non-international Armed Conflict

Rather, the situation in Iraq and Syria (like the Afghan insurgency)⁵⁴ is arguably a Non-International Armed Conflict (NIAC) between the State of Iraq and the OAG ISIS.⁵⁵ Thus, Common Article 3 (CA3) to the 1949 Geneva Conventions⁵⁶ as supplemented by Additional Protocol II (AP II) is applicable to protect civilian populations from NIAC operations. Such protection, however, is tempered in that neither Iraq nor Syria (although high contracting parties) signed AP II – such that only the limited civilian protections in CA3 apply. Similarly, the United States, as the most significant contributor of aircraft, sorties and munitions to OIR has not ratified AP II.⁵⁷

Conversely, many coalition partners (including Canada) have ratified AP II, thus requiring strict adherence to its enhanced civilian protections. Such coalition partners frequently exercise national caveats against strikes likely to result in civilian casualty (CIVCAS).⁵⁸ In the result, LOAC restrictions must be carefully considered in tasking coalition strike fighters to deliberate target prosecution in the face of anticipated CIVCAS. So, too, are limitations in dynamic prosecution critical. Coalition fighters conducting combat air patrols (CAP) may be prohibited from target engagement likely to result in CIVCAS based on national rules of engagement (ROE).⁵⁹ National caveats, therefore, indirectly permit ISIS' freedom of manoeuvre to carry out terrorist acts whilst replacement strike sorties are dynamically tasked. Arguably less constrained by treaty

54 Some scholars recognized that as the Taliban lost governing control of Afghanistan the conflict shifted from international to non-international. *See e.g.*, Schmitt, *supra* note 41, p. 308.

55 United Nations, Office of the High Commissioner for Human Rights, 'Report on the Protection of Civilians in the Non-International Armed Conflict in Iraq: 5 June – 5 July 2014' (2015) p. 4.

56 Common Article 3 governs 'armed conflict not of an international character occurring in territory of one of the High Contracting Parties between its armed forces and dissident armed forces or other organized armed groups...', *supra* note 6.

57 International Committee of the Red Cross, Database on Treaties, States Parties and Commentaries, <www.icrc.org>, August 2016.

58 In OIR, each coalition nation's senior air officer, the 'red card holder' determines which targets will be prosecuted by national aircraft taking into account national rules of engagement regardless of the 'military necessity' test being established.

59 National (policy) rules of engagement to limit theatre specific use of force are influenced by the LOAC including AP II.

commitments and resultant criminal liability relative to coalition partners, United States strike fighters typically engage such fleeting dynamic targets.

Somewhat fortunately for victims, international law jurisprudence is trending toward recognition of the more stringent protections in AP I/II as customary IHL – and therefore binding on all parties to armed conflict. In the *Tadić* Appeals Judgment, the chamber held that customary international law (CIL) had developed to govern ‘internal strife’. In the case of CA3, the Appeal Chamber noted customary and treaty laws ‘mutually support and supplement each other...’ such that ‘distinction’ and ‘precautions in the attack’ have become part of customary law.⁶⁰ More particularly, it held that AP II emanating from the core civilian protection from hostilities provisions in CA3 had crystallized into general principles of CIL.⁶¹ Perhaps this precipitated the Obama administration’s recommendation that Senate consent to the ratification of AP II, since ‘US military practice is already consistent with the Protocol’s provisions’.⁶²

Such consistent practice, however short-lived, has been called into question through the United States’ refusal to cooperate with the ICC prosecutor’s request to investigate the situation in Afghanistan. Although the preliminary examination found no evidence of targeted attacks against civilian populations or individual civilians not taking direct part in the hostilities, the report left open the possibility to investigate such crimes.⁶³ Moreover, while jurisdiction *ratione loci* over armed conflict in Afghanistan is evident, it is less so in respect of crimes alleged against non-States Parties in non-States’ territories. Subject to CIL influenced *pace Tadić* (Decision on the Defence Motion for Interlocutory Appeal) that feasible precautions ought to be taken in all armed conflicts, jurisdiction to prosecute coalition non-States Parties engaged in NIAC in Iraq and Syria is ripe for determination. Notwithstanding this persuasive trend favouring an equitable accord that war criminals should be held accountable for

60 The distinction / discrimination principle is widely recognized as customary international law such that it is binding on all parties to armed conflict regardless of the characterization. See Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law* (Cambridge University Press, Cambridge, 2005) at p. 25.

61 *Prosecutor v. Tadić*, *supra* note 48, para. 117. See also LOAC Deskbook, *infra* note 62, p. 115, citing ICRC commentary that APII civilian protections are reflective of IHL applicable in NIAC.

62 United States Army Judge Advocate General, *Law of Armed Conflict Deskbook* (International and Operational Law Department, Charlottesville, VA, 2014) pp. 27 and 113 [LOAC Deskbook].

63 Office of the Prosecutor, International Criminal Court, ‘Report on Preliminary Investigations 2017’, paras. 243–244, 4 December 2017.

the nature of the crime not the country where committed, Article 21 of Rome Statute dictates statutory paramountcy relative to CIL principles.

3.2 *Legal Principles Governing Target Engagement*

The core of targeting law is based upon the principles of ‘distinction’⁶⁴ and ‘discrimination’.⁶⁵ Distinction ensures attacks may only be conducted against military objectives,⁶⁶ including members of enemy armed forces as well as organized armed groups. Such principles include protection of civilians from hostilities (including those no longer participating in hostilities), in particular from indiscriminate attacks, protection of civilian objects and cultural property, and certain prohibitions on means and methods of warfare. Civilian objects, however, may become military objectives when the enemy uses such objects for military purposes. Similarly, civilians directly participating in hostilities may also constitute the legitimate focus of attack so long as they remain engaged in such hostilities. Moreover, commanders must take all feasible precautions in the attack to minimize incidental loss of civilian life/objects and ensure attacks are proportionate.⁶⁷

Necessary precautions include consideration of intelligence, surveillance and reconnaissance (ISR) platforms to determine time and location of attack, warnings, tactical options and selection of alternative targets to achieve

64 The principle of distinction, as codified in AP I, Article 48, requires those involved in hostilities to ‘at all times distinguish between the civilian population and combatants and between civilian objects and military objectives’. In *Tadić*, the Appeals Chamber declared that distinction applied in all armed conflicts. See *Tadić*, *supra* note 48, para. 127. The United States, despite not having ratified API, has since accepted that distinction is a principle of IHL. See Henckaerts and Doswald-Beck, *supra* note 60.

65 Discrimination operates to prevent target engagement when the incidental and collateral effects will be indiscriminate in nature, whether through use of dumb bombs or scud missiles lacking precision guidance.

66 In so far as objects are concerned, military objectives are limited to those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage. AP I, Art. 52(2). ‘Military advantage’ is not defined and its application pursuant to LOAC continues to be a contentious issue between military planners and ICRC. Growing academic consensus, however, suggests the advantage must be concrete and definite, may arise from either a single attack or larger operation, and need not determine the outcome of the war.

67 An attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated’ violates the principle of proportionality. AP I, Arts. 51(5)(b) and 57.2(b).

a similar military advantage.⁶⁸ Distinguished targeting author Geoffrey Corn repeatedly argues precautions should similarly be elevated to an IHL principle consistent with distinction and proportionality, since precautions have the greatest likelihood to mitigate civilian risk.⁶⁹

The overarching principle of proportionality, including its precautionary element, principally prohibits means or method of attack anticipated to produce collateral damage or incidental injury excessive to the concrete and direct military advantage anticipated. In modern conflict, like OIR, selection of aircraft or missile system, munitions, weaponeering (including gps-guided munitions, delay fuses, minimally fragmenting/blast warheads) small diameter bombs and formal CDE are precisely tailored to each deliberate target to achieve desired effects whilst minimizing collateral damage. Pattern of life (POL) studies, night strikes, mean point of impact (MPI) adjustments and battle damage assessments (BDA) in contemplation of re-attack are also conducted to further mitigate risk of civilian casualty. In sum, if the commander believes the planned attack of a military objective will result in disproportionate collateral damage relative to the military advantage gained, she must not attack.

There are no bright line rules which govern the commander's value judgement, nor her expectation of subordinate mission planners for which she is responsible under the Law of War. Indeed, the proportionality assessment has been described as a 'highly elastic principle' evident in that military interests successfully advocated for the inclusion of the term 'clearly excessive' to establish criminal responsibility in Article 8(2)(b)(iv) of the Rome Statute relative to AP I in which Article 57(2)(a)(iii) contains the lower threshold of simply 'excessive'.⁷⁰ In a special report to then ICTY Prosecutor, further cementing the military interest, the Committee suggested the value judgement be determined from the perspective of a 'reasonable commander' acting in good faith.⁷¹

Of note, application of the proportionality principle is limited only to 'measures forbidden by international law' when considering military necessity

68 AP I, Art. 57.

69 Geoffrey S. Corn, 'War, Law and the Oft Overlooked Value of Process as Precautionary Measure', 42 *Pepperdine Law Review* (2015), 423; see also Corn, *supra* note 40, p. 788.

70 Kai Ambos, *Treatise on International Criminal Law, Volume 11: The Crimes and Sentencing* (Oxford University Press, Oxford, 2014) p. 177.

71 See Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia, para. 50, quoted in Michael Bothe, 'War Crimes', in Antonio Cassese, Paola Gaeta and John R.W.D. Jones (eds.), *The Rome Statute of the International Criminal Court – A Commentary* (Oxford University Press, Oxford, 2002) p. 399, cited in Ambos, *ibid.*, p. 177.

in the targeting cycle.⁷² Briefly put, a commander may take all measures to engage a military objective provided such measures are not prohibited by international law, as would be, for example, the use of prohibited munitions designed to cause suffering.

3.3 *International Criminal Court*

Given that Robert Cryer aptly set out the relationship between IHL and war crimes in his comparison of international criminal tribunals and their statutes,⁷³ this article will focus on targeting prohibitions in Article 8 of the Rome Statute. Article 8 establishes jurisdiction over both war crimes committed as part of a plan or policy, large-scale commission or an individual basis. Although Professor Schabas rightly criticizes the drafting of Article 8 as inaccessible and incoherent,⁷⁴ the detailed separation of IAC and NIAC targeting restrictions will limit the expansive judicial interpretation evident in the *Tadić* Appeals Judgment. Conversely, Professor Ambos argues that, while codification may be welcomed in light of the principle of legality (*nullum crimen sine lege certa*), it might preclude 'judicial interpretation beyond *legem* to fill alleged lacunae in the codification of [NIAC] war crimes'.⁷⁵

There are common targeting prohibitions in Article 8(2)(b) (IAC-API) and 8(2)(e) (NIAC-APII):

- (i) Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities;
- (ii) Intentionally directing attacks against buildings, material, medical units and transport, and personnel using the distinctive emblems of the Geneva Conventions in conformity with international law;
- (iii) Intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict;

72 LOAC Deskbook, *supra* note 62, pp. 134–135: military necessity has long been understood to refer to such measures 'indispensable for securing the ends of war, and which are lawful according to the modern law and usages of war'.

73 Robert Cryer, 'The relationship of international humanitarian law and war crimes: international criminal tribunals and their statutes', in Harvey et al., *supra* note 44, Ch. 6, p. 137.

74 Schabas, *supra* note 36, p. 125.

75 Ambos, *supra* note 70, p. 120.

- (iv) Intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they *are not military objectives*;

Chief among the dissimilarity is the requirement to minimize collateral damage and bombardment of undefended towns included in Article 8(2)(b) (IAC) but notably absent from 8(2)(e) (NIAC):

- (iv) Intentionally launching an attack in the knowledge that such attack will cause *incidental loss of life or injury to civilians* or damage to civilian objects or widespread, long-term and severe damage to the natural environment which would be *clearly excessive* in relation to the concrete and direct overall military advantage anticipated;
- (v) Attacking or bombarding, by whatever means, towns, villages, dwellings, or buildings which are undefended and which are not military objectives.

This permits a ‘lacuna of criminal responsibility’ in NIAC.⁷⁶ Arguably, this facilitates wider target engagement against armed opposition groups like ISIS in defence of national sovereignty – subject, of course, to the above referenced trend blending IHL with treaty law.

3.4 *Mens Rea in Target Engagement*

In advocating for a modified subjective-objective test for ‘affirmative target identification’,⁷⁷ John Merriam favours an ‘honest and reasonable’ standard borne out of the *Rendulic rule*.⁷⁸ Influenced by the ICTY attack jurisprudence, Merriam notes most high contracting states’ military forces also abide by such standards.⁷⁹ Following a review of *Prosecutor v. Galić*⁸⁰ (unlawful attack of civilians), *Prosecutor v. Gotovina*⁸¹ (attack against towns) and *Prosecutor*

⁷⁶ Ambos, *supra* note 70, p. 163.

⁷⁷ John J. Merriam, ‘Affirmative Target Identification: Operationalizing the Principle of Distinction for U.S. Warfighters’, 56 *Virginia Journal of International Law* (2016) 114. Note that Merriam distinguishes the Afghanistan standard ‘likely identifiable threat’ (LIT) from ‘positive identification’ (PID) used in current operations including OIR.

⁷⁸ Rendulic rule, *infra* note 102.

⁷⁹ Merriam, *supra* note 77.

⁸⁰ *Prosecutor v. Galić*, Case No. IT-98-29-T, ICTY, Judgment, 5 December 2003, paras. 57–58.

⁸¹ *Prosecutor v. Gotovina*, Case No. IT-06-90-T, ICTY, Judgment, 15 April 2011, para. 1841, reversed on other grounds *Prosecutor v. Gotovina and Markac*, Case No. IT-06-90-A, ICTY, Appeals Chamber, Judgment, 16 November 2012.

v. *Martić*⁸² (indiscriminate attacks), Merriam concludes that the ICTY cumulatively judged the *mens rea* element for alleged distinction violations as requiring an assessment of both subjective (wilfulness) and objective reasonableness (recklessness). Merriam argues that in the absence of direct evidence of the subjective state of mind of the attacker, 'inferences can be drawn about his intent based on the indiscriminate nature of the weapons used or the targets selected' and that 'conduct will be assessed for both subjective honesty and objective reasonableness'.⁸³

The *Tadić* Appeals Chamber insisted upon a slightly higher objectivity standard of advertent recklessness, the *dolus eventualis*, in determining membership in a category 3 joint criminal enterprise. Namely, although a person 'did not intend to bring about a certain result, was aware that the actions of the group were most likely to lead to that result but nevertheless willingly took that risk'.⁸⁴

More pertinent to a Command decision to order target engagement, the Appeals Chamber in *Prosecutor v. Blaškić* considered the *mens rea* for 'ordering' in the Article 7 Individual Criminal Responsibility provisions of the ICTY Statute.⁸⁵ Specifically, it considered whether criminal liability survived a 'lower than direct intent' mental threshold. In reversing the Trial Chamber's decision which made allowance for recklessness *le dol éventuel*, the Appeals Chamber held: 'knowledge of any kind of risk, however low, does not suffice for the imposition of criminal responsibility for serious violations of international humanitarian law'. Rather, the Appeals Chamber enforced a near specific intent threshold requiring 'awareness of the substantial likelihood a crime would be committed in the execution of the order'.⁸⁶

The Rome Statute however significantly demands the higher mental threshold of intent and knowledge, thus raising the ICC prosecution bar relative to the ad-hoc international tribunals. Subject to the limiting proviso,⁸⁷ Article 30 requires *mens rea* of specific intention. Thus, to secure an Article 8(2)(b)(i-iv)

82 *Prosecutor v. Martić*, Case No. IT-95-11-T, ICTY, Judgment, 12 June 2007, para. 68.

83 Merriam, *supra* note 77.

84 *Tadić* Appeals Judgment, *supra* note 52, para. 228.

85 Statute of the International Criminal Tribunal for the Former Yugoslavia 1993, UN Doc S/Res/827, Annex B to Resolution 827 of the United Nations Security Council, 25 May 1993 [ICTY Statute].

86 *Prosecutor v. Blaškić*, Case No. IT-95-14-A, ICTY, Appeals Chamber, Judgment, 29 July 2004, para. 474.

87 See the Article 30 exception 'unless otherwise provided'. Article 28, for example, expressly incorporates the lesser criminal negligence standard of 'knew or ... should have known' in relation to the doctrine of command responsibility.

conviction for intentional or disproportionate attacks,⁸⁸ the prosecutor must prove two mental elements. The attacker must: (1) intend to conduct an attack against civilians; and (2) intend to cause the criminal consequence of the attack (killing or maiming civilians), or be aware the consequence would result in the ordinary course of events.⁸⁹ Moreover, the knowledge requirement requires the commander to be aware of the attack circumstance,⁹⁰ or alternatively, that the prohibited consequence will occur as a result of the attack.⁹¹ In the context of prohibited attacks against civilians, the Elements of Crimes specify a purpose-based intent.⁹² The commander must wilfully direct the attack against the civilian population/object encompassing *dolus directus* in the first degree.⁹³

Therefore, despite the related maxim *dolus eventualis*,⁹⁴ criminal responsibility for recklessness⁹⁵ is not captured in the Article 8(2)(b)(i–iv) attack

88 Indiscriminate attacks, which do not specifically target civilians, but accept harm as a consequence of non-discrimination are not prohibited by the Rome Statute. *See* Ambos, *supra* note 70 for argument that an indiscriminate attack violates the proportionality rule under Article 51(4) AP1.

89 Rome Statute, Article 30.

90 Commanders may not evade criminal responsibility through denying an armed conflict existed, or whether it was international or non-international in its nature per the Elements of Crimes governing Article 8 Rome Statute. *See* Elements of Crimes of the International Criminal Court, ICC-ASP/1/3 at 108, U.N. Doc. PCNICC/2000/1/Add.2 (2000) [Elements of Crimes], Articles 8(2)(b)(i) and 8(2)(b)(ii), respectively. The war crime of attacking civilians requires that '[t]he perpetrator intended the civilian population as such or individual civilians not taking direct part in hostilities to be the object of the attack'.

91 For a review of the 'contentious' mental element of the Elements of Crimes in relation to 'intentionally directing an attack, *see* Knut Dormann, 'War Crimes under the Rome Statute of the International Criminal Court, with a Special Focus on the Negotiations on the Elements of Crimes', 7 *Max Planck Yearbook of United Nations Law* (2003) 340–344.

92 Element 3 to Articles 8(2)(b)(i), (ii), (iii), (ix), (e)(i), (iii), (iv) and Element 2 to Article 8(2)(b)(xxiv), (e)(ii).

93 *Prosecutor v. Katanga and Ngudjolo Chui*, Case No. ICC-01/04-01/07-717, ICC, Decision on the Confirmation of Charges, 30 September 2008, para. 271.

94 This civil concept differs from common law recklessness in that it requires proof of volition, i.e. actual consideration the subject risk will occur and reconciliation to that consequence. *See Prosecutor v. Lubanga Dyilo*, Case No. ICC-01/04-01/06-2842, ICC, Judgment, 14 March 2012, paras. 1009–1013.

95 For an excellent explanation of the distinction between intent and recklessness, *see* Fannie Lafontaine, *Prosecuting Genocide, Crimes Against Humanity and War Crimes in Canadian Courts* (Carswell, Toronto, 2012) Section 6.1.1.

prohibitions.⁹⁶ Although an attack may be reckless as to whether civilians are killed, it will not meet the specific intent threshold without evidence of intentional targeting of civilians. Certainly, this conclusion in respect of the mental element for unlawful target engagement is consistent with the confirmation decision in *Prosecutor v. Jean-Pierre Bemba Gombo*.⁹⁷ In considering individual criminal responsibility, Pre-Trial Chamber II cemented the notion that ‘*dolus eventualis* or any or any lower form of culpability’ is inconsistent with the specific intent requirement in Article 30.⁹⁸

Despite a mental element requiring virtual certainty of the consequences,⁹⁹ the Rome Statute preserves existing defenses in ICL, including mistake of fact/law, obedience to superior orders, and, in exceptional cases, exempts criminal responsibility resultant from military necessity.¹⁰⁰

Military necessity is generally not an available defence to ICL and treaty law violations,¹⁰¹ unless a rule-based exception applies.¹⁰² For example, Article 8(e)(xii) exempts criminal responsibility for destruction of an adversary’s property – as distinct from civilians, that may never be the object of attack – when demanded by the ‘imperative necessities of the conflict’. Professor Ambos, however, in pondering on an erroneous judgment call, makes

96 For a competing view (pre-ICC), see Dormann, *supra* note 91, wherein the author suggests the *mens rea* element may be inferred from the failure to take necessary precautions before and during an attack relying upon a recklessness standard recognized in the trial judgment in *Prosecutor v. Blaškić*, Case No. IT-95-14-T, ICTY, Judgement, 3 March 2000, para. 179 [*Blaškić* Trial Judgment].

97 *Prosecutor v. Bemba Gombo*, Case No. ICC-01/05-01/08-424, ICC, Pre-Trial Chamber II, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, 15 June 2009.

98 *Ibid.*, para. 369.

99 *Ibid.*, para. 370, cited in Lafontaine, *supra* note 95.

100 Rome Statute, Articles 31–33.

101 *United States v. Wilhelm List, et al.*, Opinion and Judgment of Military Tribunal v (Case 7), x *Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law No. 10*, 19 February 1948, pp. 1230–31 [Hostage Case].

102 In the ‘scorched earth’ case, the German Commander of the 20th Mountain Army, General Lothar Rendulic, ordered the destruction of civilian buildings and lands while retreating from a planned attack to deny same to the enemy. On this charge, Rendulic was acquitted after successfully relying on The Hague Convention IV to argue that such destruction was justified if ‘imperatively demanded by the necessities of war’. See Convention IV Respecting the Law and Customs of War on Land and its Annex, The Hague, 18 October 1907, Art. 23(g). The ‘Rendulic Rule’ operates to distinguish negligent acts from criminal ones. Commanders are to be judged on information reasonably available and honestly believed at the time the targeting decision is made.

allowance for a mistake of law defence where the attacker might negate the *mens rea* 'since knowledge in this provision requires that the perpetrator makes a correct value judgment'.¹⁰³

This, of course, is central to the discussion that follows in the subsequent section. Specifically, whether the commander and planning staff conduct a proportional assessment of whether the prohibited consequence will occur as a result of the attack in the face of a published NCV limitation. And, more importantly, whether the intentional (incident to attack of a military objective) killing of civilians reliant upon NCV counting has presumptively, and therefore unlawfully, paved the runway to attack.

4 The Non-combatant Casualty Cut-off Value in Operation Inherent Resolve

Prior to reviewing media and human rights groups' criticism of NCV counting, it is noteworthy the NCV methodology has not attracted widespread public disdain. That is not surprising given the novel targeting practice originated during the Afghanistan conflict, coupled with current operational security requirements to safeguard theatre operation orders and ROE. Indeed, most commanders, war planners and combat operators, let alone professors of the Law of War, are not intimately familiar with the concept lest they have operational experience with United States targeteers in the past ten years.¹⁰⁴ Moreover, media reports are scant with details of the NCV methodology, including its tactical usefulness and almost exclusively focus on resultant civilian casualties and damage to religious and medical facilities. That media and human rights groups frequently criticize the NCV methodology as 'callous',¹⁰⁵ 'unlawful',¹⁰⁶ and 'cold calculating'¹⁰⁷ 'tolerate[d] killing',¹⁰⁸ however misinformed, remains

¹⁰³ Ambos, *supra* note 70, p. 178.

¹⁰⁴ The NCV count is a targeting policy developed by the United States government.

¹⁰⁵ *In These Times*, 'Death from Above, Remotely Controlled: Obama's Drone Wars', <www.inthesetimes.com>, 9 July 2015.

¹⁰⁶ See e.g., Human Rights Watch, 'US/Syria: Investigate Possible Unlawful US Strikes – At Least 7 Civilians Dead; Residents Say No Evident Military Target', <www.hrw.org>, 27 September 2014.

¹⁰⁷ See e.g., Ali Watkin, 'The Number Games: The Pentagon employs cold, hard science to calculate the value of a human life – and when it's ok for the U.S. military to take an innocent one', *BuzzFeed World News*, <www.buzzfeed.com>, 28 February 2016.

¹⁰⁸ Nick McDonell, 'Civilian casualties are not inevitable, the military sets a number in advance', *Los Angeles Times*, <www.latimes.com>, 31 March 2017.

cause for concern. Independent investigation should be wholeheartedly welcomed with a view toward taking ‘constant care to spare the civilian population, civilians and civilian objects’¹⁰⁹ from the harmful and inevitable perils of war. As guardians of democracy, commanders and targeteers must constantly strive to respect the ethical, moral and legal values of the Society to be protected.

4.1 *Collateral Damage Estimate Methodology*

To appreciate the utility of the NCV count in combat operations, it is important to first examine its precautionary companion: the collateral damage estimate (CDE). The CDE is a command tool based on scientific evidence derived from research, experiments, computerized modelling and battlefield intelligence designed to adapt in time and space to prosecute enemy threats.¹¹⁰ Its goal, applied through a computer algorithm, is to mitigate unintended consequences and collateral damage to civilians, civilian objects and the natural environment. The classified software compares known weapons effects against physical and structural characteristics of buildings and materials, population density tables and proximity to no-strike targets to produce a collateral hazard ring. If the weapon effects encroach upon protected persons or places (identified within the ring), weaponeering modifications including warhead, fuse, delivery heading, angle of fall of shot and aiming point can be programmed to reduce predicted collateral effects. The CDE call ranges from one to five with a ‘Five high’ call likely to result in civilian casualty and escalated through the chain of command. In OIR, subject to a pre-determined NCV count, such targets were referred to the either the United States Secretary of Defense or the President pursuant to the Sensitive Target Approval and Review process (STAR).¹¹¹

The ‘CDE call’ is a modelled prediction, it does not guarantee a particular outcome and is based upon the data sets included in the software. Principally, the CDE call assists commanders in making a proportionality judgement in respect of tolerable collateral damage in relation to anticipated military advantage to engage positively identified military objectives.

¹⁰⁹ AP I, Article 57(1).

¹¹⁰ United States, Chairman of the Joint Chief’s Staff Instruction 3160.01B, *No Strike and the Collateral Damage Estimation Methodology* (11 December 2015).

¹¹¹ United States, Chairman of the Joint Chief’s Staff Instruction, Sensitive Target Approval and Review Process (12 November 2013) (classified).

4.2 *Non-combatant Casualty Cut-off Value (NCV)*

Taking into account particular sensitivities to civilian casualties based on cultural, geographical, operational progress, host nation views and domestic political considerations in the area of operations, the President or Secretary of Defense will establish the NCV to be published in classified theatre standing orders and ROE. The NCV count is a policy instrument to facilitate the proportionality assessment by limiting the acceptable number of civilian casualties a subordinate commander may permissibly risk in attack. The NCV count may be specified for high value targets (HVTs), geographic/urban areas and heavily populated civilian places including banks, oil fields and public markets. The NCV policy may apply to different headquarters and be command-tiered to respective Commanding Generals (CG). In OIR the air campaign started with an NCV=0 count, with higher cut-off values subsequently delegated to CENTCOM and OIR-CG throughout the theatre of operations, albeit expressly stated not to be further delegated to the target engagement authority (TEA) responsible for conducting the final (*ex-ante*) proportionality assessment.

Provided the CDE call predicting the number of civilian casualties is within the prescribed NCV count, the subordinate commander (subject to her own proportionality assessment) may authorize target engagement. Conversely, where the CDE call exceeds the NCV count, the subordinate commander must 'refer-up' the chain of command to a superior commander or Secretary of Defence to seek strike authorization. Thus, as the predicted risk to civilian casualty increases, so too does the level of command required to approve the attack.¹¹²

Therefore, the NCV policy at first blush is both strategically and legally sound. From a strategic viewpoint, a published NCV will promote efficient and swift targeting decisions. If the NCV is below the CDE call, the proportionality assessment will be streamlined to facilitate rapid engagement of dynamic and fleeting targets through shortening the sensor to shooter link. Moreover, commanders seen to reduce civilian casualty through deliberate, focused, NCV application will build stronger relationships with host nation security forces, vetted opposition groups and the local populace, thereby solidifying 'hearts and minds' partnerships to achieve mission success.

Conversely, the politically imposed NCV inhibits the Commander's freedom of manoeuvre in the battlespace. CDE calls above the NCV gut dynamic target prosecution given the time required to refer-up to the Superior Commander and/or executive authority. This delay provides a substantial tactical advantage to ISIS fighters and increases civilian risk of harm. Finally, ISIS intelligence

¹¹² Corn, *supra* note 69, p. 461.

operatives may determine the coalition NCV policy and employ lawfare tactics to impair proportionality assessments through co-locating with civilians or seek to delegitimize coalition mission support (locally and domestically) through exaggerating civilian casualty. In OIR, ISIS frequently co-located equipment, fighters and training facilities in dual-use daycares, schools, mosques, grain silos and public markets to discourage strikes that would most certainly cause excessive collateral damage. In the rare case of coalition casualty,¹¹³ the propaganda magazine Dabiq would undermine coalition support through exaggerating unlawfulness, dishonour and mischaracterizing such strikes as murder.

From a Law of War perspective, the NCV count is largely consistent with the profession of arms' cornerstone obligation to take constant care to mitigate civilian casualty and unnecessary suffering in planning and executing attacks. Moreover, the NCV count serves legitimate political interests to restrict a subordinate commander's proportionality assessment from exceeding that of the reasonable military commander. Indeed, the subjective, honest and good faith belief of the military advantage to be gained relative to the anticipated civilian casualty will differ among reasonable commanders. One commander may view as acceptable the loss of 100 civilians to destroy an ISIS controlled oil refinery (its revenue funding jihadi terror operations), while another might view – on precisely the same target development information – the military advantage too costly relative to the anticipated loss and opt for a lesser allowance of killing ten civilians. The NCV is particularly important to control special forces operatives who tend to have a 'must win at all cost' ethos and whose tactical employment necessarily results in diminished battlespace supervision. Therefore, through setting an NCV in advance of planned operations, commanders at all levels have a common operating picture (COP) thereby better ensuring consistency in the application of lethal force throughout the area of responsibility (AOR).

4.3 *Misapplication of the NCV Methodology*

The danger to be guarded against, however, occurs when the NCV methodology is ill-understood and misapplied in (typically) lower levels of the chain of command. Such misapplication lends legitimate criticism the methodology is inconsistent with IHL, including the duty to constantly guard against civilian

¹¹³ The author accepts there is merit to the widespread criticism of the OIR civilian casualty tracking procedures which require significant improvement as evident through comparison to human rights groups, like the Syrian Observatory for Human Rights, Amnesty International, Airwars etc. who regularly estimate casualty rates at a much higher rate per month.

casualty and unnecessary suffering. To be clear, this erroneous application is not the purported violation of the distinction principle; oft reported, but not well understood by professional media and some human rights groups. Such claims that judge any killing of civilians in air combat operations as war crimes without due consideration of military necessity are ill-founded.¹¹⁴ Indeed, such reporting is all too representative of the debate concerning the Israeli Defense Forces' (IDF) controversial use of 'roof-knocking'.¹¹⁵

Rather than challenging the principle of distinction, the legal concern and central argument of this paper is that improper application of the NCV methodology violates the LOAC requirement to take feasible precautions in the attack and conduct a proportionality assessment for civilian casualties below the NCV. Consider again the refinery example above. Although the NCV of 100 had been pre-determined as a matter of target engagement policy, the commander must still conduct a proportionality assessment to determine whether the number of anticipated civilian casualties below the limit – whether 10, 30, 50 – is justifiable in relation to the military advantage to be gained. Once the NCV has been set, there is a mistaken presumption that precautions need not be taken, that a proportionality assessment need not be conducted, since risks are already factored into the published NCV. This presumptively permissible loss of life, akin to an allowance, is prohibited by the Laws of War, including the fourth Geneva Convention, its additional protocols and IHL principles.

That a presumptive loss of life below the NCV is non-compliant with LOAC is readily apparent to trained operational law advisors and senior commanders.

114 For a more nuanced view, see generally the International Committee of the Red Cross, Gloria Gaggioli, *Report of the Expert Meeting on the Use of Force in Armed Conflicts: Interplay Between the Conduct of Hostilities and Law Enforcement Paradigms* (ICRC 2013) 71.

115 Roof-knocks are an IDF targeting method to detonate a small diameter bomb on the roof of a dual-use military objective to warn civilians within of an impending airstrike and encourage evacuation. Following several years of media and human rights groups' pressure to act, the United Nations Human Rights Council issued a scathing report against Israel declaring the targeting practice inconsistent with the IHL obligation to provide effective warnings and amounted to a form of prohibited attack against civilians in the buildings. See United Nations, Human Rights Council, Fact Finding Mission on the Gaza Conflict, Human Rights in Palestine and other Occupied Arab Territories, U.N. Doc. A/HRC/12/48, pp. 532–535, (15 September 2009) [Goldstone report] criticizing the roof-knocking as ineffective because citizens should not have to guess what the warning means and may be potentially terrorized by the warning. For a competing view that roof-knocking does not constitute a war crime in the context of the Gaza conflict, see Michael N. Schmitt and John J. Merriam, 'The Tyranny of Context: Israeli Targeting Practices in Legal Perspective', 37 *University Pennsylvania Journal International Law* (2015) 53.

Conversely, the most significant risk in misapplication of the NCV methodology occurs in lower levels of the chain, particularly in smaller units without an embedded legal advisor.¹¹⁶ The complexity of the issue, particularly in the fog of war, cannot be overstated. The point was lost on a journalist who zeroed in on this reality without appreciating its significance in reporting on the CDE methodology employed in the special operations drone program in Syria. In responding to a query on how drone operators ‘decide[d] when there were too many civilians present to risk the strike’, the drone operator – erroneously and unlawfully –¹¹⁷ recounted the NCV policy ‘as long as it’s under ten we’re good to take the shot’, clearly not conducting a feasibility or proportionality assessment on the anticipated loss of life below the apparent NCV equal to ten.¹¹⁸ Similarly, an embedded journalist erroneously described the NCV policy as a *carte blanche* authorization to kill ten civilians per strike. Reporting 4,589 strikes conducted in 2016, the article absurdly reported United States policy was to tolerate up to 45, 890 deaths of innocent Iraqi and Syrian civilians incident to destruction of ISIS objectives.¹¹⁹

Guarding against the dual risk of misapplication and misinformation is essential to ensure the NCV policy fulfils, rather than thwarts, its intended purpose to minimize civilian casualty in armed conflict. The commander directing the drone strike was duty bound to take precautions, including robust surveillance, consideration of missile, fuse setting (delay, point detonating or air burst), fall of shot and aiming point to minimize collateral damage. Moreover, to independently conduct a proportionality assessment as to whether up to ten civilian casualties, including a fewer number from zero to ten, was justified in relation to the concrete and direct military advantage to be gained based on all available information at the time.

To take all feasible precautions in the attack necessarily requires the drone operator to implement a cold shift plan to ensure that if ISIS fighters left the target area while civilians remained after launch, the missile could be shifted

¹¹⁶ In general, coalition forces employ operational attorneys at the Brigade level, although US forces typically have the benefit of embedded legal advisors at the subordinate battalion headquarters.

¹¹⁷ In addition to the feasibility and proportionality assessments required by IHL, recall, Dormann, *supra* note 91, who argued that failure to take precautions in the attack, to which should be added when the circumstances irrefutably call out for such inquiry, might give rise to an inference when the commander intentionally failed to consider ‘the prohibited consequence will occur’, thereby giving rise to criminal responsibility pursuant to Article 8 of the Rome Statute.

¹¹⁸ Watkin (BuzzFeed World News), *supra* note 107.

¹¹⁹ McDonnell (*LA Times*), *supra* note 108.

to a safe detonation point. Feasible precautions and sound proportionality assessments should garner similar concern in respect of removing ‘humans from the loop’ through adopting targeting algorithms in autonomous weapon systems including drones.¹²⁰

4.4 *Reliance on the NCV Methodology and War Crimes*

The question remains whether erroneous application of the NCV methodology amounts to a war crime in contravention of the Rome Statute? Despite Merriam and Dormann’s sensible argument that a mixed subjective-objective *mens rea*, or alternatively a recklessness standard, ought to be used to determine criminal responsibility, it is unlikely such perspectives would satisfy the strict specific intent threshold of ‘intentional’ or ‘wilful’ as required by the Rome Statute. Clearly, failure to take precautions and/or conduct a proportionality assessment below the NCV count will necessarily preclude the commander from gaining ‘awareness’ the prohibited CIVCAS will occur; awareness which is required by Article 30 of the Rome Statute. Therefore, lack of specific knowledge will render a war crime conviction before the ICC untenable.¹²¹

Similarly, wilful blindness, although consistent with the ICTY’s view in *Blaškić* ‘when it was impossible not to know’,¹²² falls short of the requisite mental threshold of ‘intentional’ required by the Rome Statute. In his considered assessment of the *mens rea* of Rome Statute crimes, legal scholar Mohamed Badar argues that Article 30(3) limits the meaning of knowledge to actual knowledge as opposed to constructive knowledge.¹²³ A reading of the elements of crimes corroborates this analysis since some offences (for example conscripting children under 15 years into national armed forces) expressly include ‘knew or should have known’ whereas the elements interpreting Article 8 war crimes require strict intention and awareness.¹²⁴

Despite reckless application of the NCV methodology not rising to the level of a war crime before the ICC, additional training for all combat operators in

120 Michael N. Schmitt and S.J. Thurnher, ‘Out of the Loop: Autonomous Weapons Systems and the Law of Armed Conflict’, 4 *Harvard National Security Journal* (2013).

121 Antonio Cassese writing before the *Lubanga* judgment was critical of the draft provisions, calling the failure to include recklessness a ‘shield’ to protect military interests. See Antonio Cassese, ‘The Statute of the International Criminal Court: Some Preliminary Reflections’, 10 *European Journal International Law* (1999) 158.

122 *Blaškić* Trial Judgment, *supra* note 96.

123 Mohamed Elewa Badar, ‘The Mental Element in The Rome Statute of the International Criminal Court: A Commentary from a Comparative Criminal Law Perspective’, 19(3) *Criminal Law Forum* (2008) 473–518.

124 Elements of Crimes, *supra* note 90.

the sensor to shooter link is warranted. In particular, Command staff must be better educated to conduct a fulsome proportionality assessment of anticipated casualties below the NCV limit. This is particularly important since the standard applied in international tribunals, military disciplinary tribunals and domestic courts will likely include culpability for criminal recklessness.¹²⁵ Finally, given the magnitude and frequency of terrorist atrocities described at the beginning of this article, coupled with ISIS persistent lawfare practice to co-locate fighters and equipment among civilians, it is likely an honest, good faith, proportionate assessment of the military advantage to be gained will withstand the most serious of judicial scrutiny.

5 Conclusion

There is good reason to be cautious about extending application of the NCV in coalition operations, like OIR, to non-international armed conflicts and, in particular, to subordinate headquarters with less experienced command and plans officers lacking embedded legal support. Moreover, commanders must remain vigilant to corroborate target information from local partner forces, including the ISF and VSO who demonstrate minimal inclination to apply LOAC protections.¹²⁶

Media and human rights groups' criticism that coalition reliance on the NCV constitutes a war crime finds no support upon reading the Rome Statute. To the contrary, policy-based, command-driven, plans-led, operational-execution of the NCV is a sound legal and strategic measure to defeat ISIS whilst minimizing civilian casualties. Beneficially, NCV restrictions compel commanders to conduct focused proportionality assessments to respond to prevailing operational threats.¹²⁷

¹²⁵ In Canada, the *mens rea* under the *Crimes Against Humanity and War Crimes Act*, s.c. 2000, c.24 mirrors the Rome Statute. For an analogous discussion of the mental element in *R v. Munyaneza*, [2009] QCCS 2201, See Fannie LaFontaine, 'Crimes Against Humanity and War Crimes Act on Trial', 8 *Journal of International Criminal Justice* (2010) 277.

¹²⁶ Amnesty International, Annual Report: Iraq 2015/2016. See also 'Death Everywhere: War Crimes and Human Rights Abuses in Aleppo Syria', <www.amnesty.org>, 2015.

¹²⁷ Given enhanced situational awareness, operational commanders are best equipped to conduct proportionality assessments relative to political overseers. Operational commanders are alive to the tempo of ISIS manoeuvre and the pulse of its leadership. Moreover, operational commanders witness first-hand the atrocities committed by ISIS and console victims left in its wake. While commanders must be vigilant to guard against tunnel vision and retaliatory operations, particularly where friendly forces fall in suicide or

Where proportionate focus is lost in reliance on presumptive or conclusive kill rates, inefficient and imprecise fires result, war crime liability arises and public confidence in support of the mission is irreparably harmed. Reliance on the NCV ceiling as a presumptive casualty allowance must be strictly denounced. Regardless of the ravages of war, commanders and targeteers must continually strive to conduct proportionate combat assessments below the NCV ceiling.

Reckless failure to do so, while not a Rome Statute offence, infringes upon the protection afforded civilians in NIAC, distinguishing coalition from lesser military forces. Commonplace in Western Syria, Russian and Syrian Regime forces continue to commit war crimes through conducting indiscriminate attacks using conventional (non-precision guided) munitions resulting in civilian deaths and deliberate destruction of civil infrastructure including hospitals, mosques, schools and refugee camps.¹²⁸

That coalition forces embrace the military ethos in defence of common democratic values and beliefs must not be lost in battle. In order to defeat ISIS in a just, honourable and lasting manner, the coalition must seek not to avoid prosecution, but to take constant care to spare civilians.

VBIED attacks, they must be empowered to take necessary action to suppress terrorist atrocities that kill, harm and displace thousands of innocent civilians. Throughout targeteers and pilots must exercise tactical patience in POL studies and collateral scans respectively to wait out ISIS lawfare tactics.

¹²⁸ See *e.g.*, Philip Luther, 'Syria: Fatal airstrike on maternity hospital a potential war crime', Amnesty International, 29 July 2016; *see also* BBC News, 'Syria conflict: Air strike on refugee camp 'could be war crime', <www.bbc.com>, 6 May 2016.